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In the Supreme Court of the United States

OCTOBER TERM, 1980

PAPAGO TRIBAL UTILITY AUTHORITY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that it had no jurisdiction under the Federal Power Act to review an order of the Federal Energy Regulatory Commission denying a motion to reject a rate filing, where the rate filing was accepted subject to refund if the Commission finds, after a full evidentiary hearing, that the filed rate was unjust and unreasonable.

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* Arizona Public Service Company, Arizona Power Authority, Wellton-Mohawk Irrigation & Drainage District, and Maricopa County Municipal Water Conservation District No. 1 were intervenors in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 628 F.2d 235. The orders of the Federal Energy Regulatory Commission (Pet. Apps. B and C) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1980. The petition for a writ of certiorari was filed on September 22, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Sections 205, 309 and 313(b) of the Federal Power Act, 16 U.S.C. 824d, 825h and 825*l*, and 18 C.F.R. 35.5 and 35.13(b)(5)(i) are set forth at Pet. App. D.

STATEMENT

Arizona Public Service Company (APS), an electric utility, sells electricity for resale to petitioner, Papago Tribal Utility Authority. These sales are subject to the jurisdiction of the Federal Energy Regulatory Commission under Subchapter II of the Federal Power Act, 16 U.S.C. 824 *et seq.*

In 1978, APS filed a new schedule of electric rates with the Commission, proposing to raise its jurisdictional rates to several of its customers, including petitioner. Petitioner opposed the rate increase, claiming that APS' filing was unlawful on its face for a variety of reasons (Pet. App. A-3).[1]

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[1] Petitioner argued (Pet. App. A-3): (1) that APS had misstated its income tax obligation; (2) that APS' three-year period for calculating certain demand charges should be re-

In its response, APS acknowledged that the income tax rate employed in its filing was erroneous and that its billing demand estimate for petitioner was excessive. Accordingly, it agreed to adjust its proposed rates to correct those errors. It argued, however, that the other challenges raised by petitioner should be resolved only after a hearing before the Commission, as contemplated by Section 205 of the Federal Power Act, 16 U.S.C. 824d (Pet. App. A-3 to A-4).

The Commission granted petitioner's motion for summary disposition as regards the income tax issue but denied the motion as to all other issues.[2] With this modification, it accepted the proposed rate schedule for filing (subject to refund) and ordered that a hearing be held to resolve the remaining issues (Pet. App. A-27 to A-34). Petitioner sought rehearing on the ground that APS' rate filing contained patent defects requiring its rejection. Finding that APS' filing was in "substantial compliance" with the filing rules and that petitioner's arguments raised issues of fact not ripe for summary disposition, the Commission denied rehearing (Pet. App. A-40 to A-42).

Papago then filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, under Section 313(b) of the Fed-

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duced to one year; (3) that APS' regulatory expenses should be amortized over a two-year period rather than the proposed one-year period; (4) that APS should have borne the expense of certain low-cost sales; (5) that APS' rate of return was excessive, and (6) that APS had overstated petitioner's unit demand charge.

[2] Although APS had admitted overestimating petitioner's demand for service, the Commission decided against summary disposition of that issue because it could not "summarily conclude that the estimation of load projections were unreasonable at the time the estimates were made" (Pet. App. A-41 n.3).

eral Power Act, 16 U.S.C. 825*l*. The court of appeals dismissed the petition for review (Pet. App. A-1 to A-26), concluding that the Commission's order was not final (*id.* at A-8 to A-10) and imposed no irreparable injury on petitioner (*id.* at A-10 to A-12), and that immediate review by the court "would invade the province reserved to the discretion of the agency" (*id.* at A-17; footnote omitted).

ARGUMENT

In ruling that the Commission's order denying a motion for summary rejection of a rate filing was not subject to immediate judicial review, the court of appeals applied well established legal principles to the particular facts of this case. The decision below is consistent with the decisions of this Court and other courts of appeals, and does not merit further review.

It is a fundamental principle of administrative law that a party challenging an agency's actions must first exhaust its administrative remedies before seeking review in the courts. See, *e.g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938); *Petroleum Exploration, Inc.* v. *Public Service Comm'n*, 304 U.S. 209, 221-222 (1938); *McKart* v. *United States*, 395 U.S. 185, 193-195 (1969). That rule governs here. More than 40 years ago, this Court held that under Section 313(b) of the Federal Power Act the courts may review only those "orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case." *FPC* v. *Metropolitan Edison Co.*, 304 U.S. 375, 384 (1938).

The Commission's order in this case falls far short of these requirements. The court below noted (Pet. App. A-10; emphasis in original) that "[a]cceptance of [the rate] filing, coupled with scheduling of a hearing, is the *initiation* of [the] administrative proceeding," and that "the same issues now posed for summary disposition will also constitute the principal issues in the full administrative hearing." It therefore correctly concluded that "[r]eplacing one comprehensive judicial review proceeding, based on a full record, with piecemeal proceedings based almost solely on a bare rate filing would be a poor technique of judicial administration, with unfortunate consequences for courts, agencies, and litigants as well" (*ibid.*).

Nor has petitioner demonstrated that it will suffer irreparable injury if denied immediate review. As the court of appeals observed, under Section 205(e) of the Federal Power Act, 16 U.S.C. 824d(e), any excess payments by petitioner "will be refunded, with interest, if the new rates are not proven to be just and reasonable" (Pet. App. A-11; footnote omitted). Thus, petitioner is protected by statute "from the interlocutory consequences of an unjust and unreasonable rate increase" (*ibid.*), and "has suffered no injury cognizable under the Act that cannot be remedied upon review of the final order of the Commission" (*id.* at A-12; footnote omitted).[3]

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[3] Petitioner erroneously asserts (Pet. 14-15) that the court's finding of no irreparable injury conflicts with this Court's decisions in *FPC* v. *Hunt*, 376 U.S. 515 (1964), and *FPC* v. *Tennessee Gas Co.*, 371 U.S. 145 (1962). While *Hunt* did state that "the possibility of refund does not afford sufficient protection" (376 U.S. at 524), as the court below observed (Pet. App. A-11 n.15), the Court in *Hunt* "was referring to the danger that the effect of an overpriced newly-

Although the Commission has promulgated a regulation (18 C.F.R. 35.5) that provides for the rejection of a rate filing "which patently fails to substantially comply" with applicable requirements, the Commission's procedural filing requirements were not intended to confer benefits on private parties and may be relaxed or waived within the Commission's discretion. The Commission's discretionary decision in this case to relax its own procedural rules is not subject to judicial review. See *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 538-539 (1970). In short, "[t]he agency's choice of procedure —whether to dispose of a case summarily or to schedule a hearing—is not a proper concern of the courts in the absence of substantial prejudice to a party" (Pet. App. A-13). No such prejudice has been shown here.

As noted by the court of appeals (Pet. App. A-13 to A-17), the decision below is consistent with the decisions of this Court holding unreviewable agency orders refusing to suspend or investigate rate increases. *E.g.*, *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979); *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963). Judicial review of the Commission's decision to accept a rate filing, like review of agency decisions concerning

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certificated service might 'splash over' into unregulated intrastate markets." No such danger is present here.

Petitioner's reliance upon *Tennessee Gas* is similarly misplaced. That case holds that where, after hearing, refunds are determined to be due, they can be ordered immediately, even before the entire rate proceeding is complete. Here, however, the Commission has not yet completed such a hearing and therefore has not had an opportunity to pass upon the validity of the new rates.

the suspension and investigation of new rates, "would * * * undermine the Commission's primary jurisdiction by bringing the courts into the adjudication of the lawfulness of rates in advance of administrative consideration." *Southern Ry.* v. *Seaboard Allied Milling Corp., supra*, 442 U.S. at 460.

There is no merit to petitioner's argument (Pet. 8) that the decision below "radically conflicts * * * with three decisions in the Court of Appeals for the District of Columbia Circuit and with decisions of the Second and Fifth Circuits." Neither *Southern Natural Gas Co.* v. *FPC*, 547 F.2d 826 (5th Cir. 1977), nor *International Business Machines Corp.* v. *FCC*, 570 F.2d 452 (2d Cir. 1978), cited by petitioner (Pet. 11-13), even discusses the issue of reviewability.[4] Nor is there any intra-circuit conflict. As the court below observed (Pet. App. A-25), the decisions in *Municipal Light Boards* v. *FPC*, 450 F.2d 1341 (D.C. Cir. 1971), cert. denied, 405 U.S. 989 (1972), and *City of Groton* v. *FERC*, 584 F.2d 1067 (D.C. Cir. 1978), similarly do not address the issue of judicial reviewability of the Commission's refusal to reject allegedly invalid rate filings.[5] Moreover, the

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[4] Indeed, the Second Circuit in *Niagara Mohawk Power Corp.* v. *FPC*, 538 F.2d 966, 969-971 (1976), utilized a line of analysis similar to that employed by the court below in holding that an order of the Commission directing an investigation under Section 206 of the Federal Power Act, 16 U.S.C. 824e, is not reviewable.

[5] In a portion of the *Municipal Light Boards* opinion that discussed reviewability of agency action, the court of appeals, relying on this Court's decision in *Arrow Transportation Co.* v. *Southern Ry., supra*, held that the Commission's order suspending a rate change was not reviewable. 450 F.2d at 1349-1352. In *City of Groton* v. *FERC, supra*, the court briefly touched on the scope of judicial review of the Com-

court in this case explained that the dictum in *Associated Press* v. *FCC*, 448 F.2d 1095, 1103 (D.C. Cir. 1971) ("an agency has the power and in some cases the duty to reject a tariff that is demonstrably unlawful on its face") is best understood "as stating that an agency order accepting a rate filing may be reviewable if the order violates a *duty* imposed on the agency" (Pet. App. A-24; emphasis in original). Since, as the court below further pointed out, the Commission "owes no one the *duty* to reject a rate filing, even if it is patently invalid," the Commission's refusal to reject APS' filing is not subject to review in the courts (*ibid.*; emphasis in original).

Finally, even if a conflict on this issue could be said to exist among various panels within the District of Columbia Circuit, that court can resolve the problem and there is no occasion for this Court to intervene. *Wisniewski* v. *United States*, 353 U.S. 901 (1957). Review would be particularly inappropriate here, since petitioner did not attempt to resolve the alleged intra-circuit conflict by seeking rehearing en banc in the court of appeals.

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mission's rejection of a rate filing, but the court did not discuss the more fundamental question of reviewability *vel non*. 584 F.2d at 1070.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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